Commission's lawful authority over interstate matters.[22] That was so, the court said, even though the local competition provisions "may have a tangential impact on interstate services."[23]

C. Section 222(e) Differs Significantly From The Statutory Provisions At Issue In Iowa Utilities Bd.

The Eighth Circuit's decision centers on the fact that the local competition provisions at issue before it contained express delegations of authority to the states. That is not the case with Section 222(e).

Section 222(e) contains no express delegation to, let alone any mention of, the states. Although the Commission is not expressly mentioned either, it is well-established, of course, that there need not be an express delegation for the Commission to have jurisdiction over matters contained in the Act.[24] The

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22 Id. (access to an ILEC's network in order to provide local telephone service is an intrastate activity "even though the local network . . .is sometimes used to originate or complete interstate calls").

23 Id.

24 For that matter, the Commission's jurisdiction is not predicated on the matters being "expressly" contained in the Act. See, e.g., United States v. Southwestern Cable Co., 392 U.S. 157, 169-178 (1968)(upholding Commission jurisdiction over cable television despite no express statutory statement of such authority and Commission had earlier determined that it lacked such power and had been turned down twice by Congress in efforts to obtain statutes expressly granting such authority).

Eighth Circuit's decision is not to the contrary;[25] it holds only that where there is an express delegation to the states, the Commission must have its own express delegation or show impossibility in order to regulate the subject-matter granted to the states. As there is no express delegation here, Iowa Utilities Bd. does not affect the Commission's jurisdiction under Section 222(e).

Another critical distinction between the local competition provisions at issue in Iowa Utilities Bd. and Section 222(e) is the different character of the subject-matter governed by the statutes. The local competition provisions are found in Part II of Title II of the Act and are concerned with competitive LECs' ability to obtain access to incumbent LECs' telephone networks. For that reason, the Eighth Circuit held that matters covered by the local competition provisions -- interconnection, unbundling of network elements, transport, etc. -- were fundamentally intrastate in character. Section 222(e), in contrast, is found in Part I and not Part II of Title II. That is significant as it means that Section 222(e) is not part of the local competition provisions and thus is not concerned with the opening of the local exchange market to competitors. Rather, Section 222(e) is singularly devoted to the fostering of competition in the directory market. That market is not fundamentally intrastate in

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25 Given that Southwestern Cable is a Supreme Court decision, and therefore binding on the Eighth Circuit, Iowa Utilities Bd. can not be to the contrary.

character as shown below in Section V.1. Consequently, much of Iowa Utility Bd. has no applicability here.

Indeed, the Eighth Circuit's conclusions concerning the applicability of Section 2(b) to the local competition provisions are not at all relevant to subscriber list information. As shown in Section V, the Commission's authority over SLI would not intrude upon a matter fundamentally intrastate in nature and is based upon valid federal interests that would be negated by conflicting state regulations. Thus, the Commission's jurisdiction is not limited by operation of Section 2(b).

D. Section 222(e) Satisfies The Impossibility Exception To Section 2(b).

Although ADP does not believe that Section 2(b) applies to the Commission's jurisdiction over SLI, Section 222(e) easily satisfies the impossibility exception to Section 2(b). As explained by the D.C. Circuit, the impossibility exception has three elements: (1) the matter to be regulated must have both interstate and intrastate aspects; (2) Commission preemption must be necessary to protect a valid federal regulatory objective; and (3) state regulation would negate the Commission's exercise of its own lawful authority "because regulation of the interstate aspects of the matter cannot be 'unbundled' from regulation of the intrastate aspects."[26] SLI satisfies all three elements of this test.

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26 Maryland PSC, 909 F.2d at 1515 (upholding Commission's preemption of states' authority to set the rates that LECs charged IXCs for DNP service, the disconnection by a LEC of

1. SLI Has Both Interstate And Intrastate Aspects.

Subscriber list information is used for both interstate and intrastate purposes. For example, LECs often gather and combine SLI from multiple states into the same directory. There are listings from businesses from six different states[27] plus the District of Columbia on page 221 of the White Pages section of Bell Atlantic's Yellow Pages directory for the District of Columbia. Cincinnati Bell's residential directories combine listings from Ohio, Kentucky, and Indiana.[28] Independent directory publisher and ADP member, The Sunshine Pages, reports that its Memphis directory contains listings from more than 20 states and two foreign countries.

Although a majority of a LEC's directories are probably distributed within its LEC's service area, almost all LECs do or will provide (sell) their directories to interested entities from other states or countries. In addition, many LECs place their SLI in Internet directories, thereby making the SLI accessible to interested users worldwide. BellSouth, US West, Ameritech, and PacBell have combined their "yellow pages" Internet offerings into one common website. BOCs have also grouped together to offer a single search interface for Internet White Pages. The

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a local subscriber's telephone for failure to pay his long distance bill).

27 The states were: California, New York, New Jersey, Pennsylvania, Maryland and Virginia.

28 Cincinnati Bell's business directories contain listings from additional states.

BOCs are not alone, other LECs and independent directory publishers offer (or are in the process of offering) Internet directories.[29]

More critically, there is no requirement that a LEC provide its SLI only to publishers intending to make intrastate directories or to publishers located in the same state as the LEC. Section 222(e)'s command is much broader, requiring LECs to sell their SLI to any prospective directory publisher. Such publishers need not be within the LEC's state or intend to publish a directory for intrastate use. BellSouth, for example, sells its listings for Louisiana through Birmingham, Alabama, and Atlanta, Georgia.[30] Indeed, one of ADP's members, The Sunshine Pages, purchases and combines listings from 4 states into one directory.

It is also noteworthy that end-users employ directories for both interstate and intrastate purposes. People living in Maryland, for example, may use their directory to obtain the phone number or address of a restaurant in nearby Virginia. An Ohio entity seeking to do business with multiple Florida

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29 The interstate sale of SLI or posting of SLI on the Internet establishes that SLI is not a purely intrastate service. See People of the State of California v. FCC, 4 F.3d 1505, 1514 (9th Cir. 1993)("The dividing line between the regulatory jurisdictions of the FCC and states depends on the nature of the communications which pass through facilities [and not on] the physical location of the lines.")(quoting NARUC, 746 F.2d at 1498)).

30 A Canadian publisher, for example, may wish to obtain SLI from NYNEX in order to create a New York directory to sell throughout Canada.

companies may obtain a BellSouth directory or obtain BellSouth listings over the Internet for the purpose of making interstate calls. Given the above, it should be uncontroverted that SLI has both interstate and intrastate aspects.[31]

2. The Commission Has Valid Federal Objectives In Regulating SLI.

The Commission has ample justification for issuing rules implementing Section 222(e), even rules preempting conflicting state SLI regulation.[32] Section 222(e) requires that SLI be provided at reasonable rates, terms, and conditions. Thus, the Commission certainly has a viable interest in ensuring that state regulation does not permit unwarranted charges or unreasonable conditions.[33] Indeed, the Conference Report -- -- states that Section 222(e) was enacted to "guarantee[] independent publishers access to [SLI]."[34] Unreasonable rates or conditions would

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31 See Maryland PSC, 909 F.2d at 1515 (holding that DNP was not exclusively intrastate: "we have frequently held that services provided locally by the LECs which support access to the interstate communications network have interstate as well as intrastate aspects").

32 As noted in its pleadings in this proceeding, ADP believes that states should be permitted to regulate SLI provided that such regulations are consistent with, and do not frustrate, those of the Commission.

33 See Maryland PSC, 909 F.2d at 1515-16 (element two of impossibility met where Commission's preemption was designed to prevent the interstate ratepayer from paying "more than market value and more than the FCC believes is just for services provided by the LEC").

34 See H. R. Conf. Rep. No. 230, 104th Cong., 2d Sess. 205 (1996).

therefore deprive competing directory publishers of the guarantee expressly provided by Congress.[35]

ADP notes also that the Commission has a valid interest in promoting competition in the directory publishing market. That is the very essence of Section 222(e). Such interest is sufficient to satisfy element two of the impossibility test.[36] ADP has supplied numerous examples of anticompetitive behavior by LECs with respect to their provision of SLI.[37]

3. SLI Cannot Be Separated Between Interstate And Intrastate And Thus State Regulations Could Negate The Agency's Authority.

It would be impractical, if not technically impossible, to separate the intrastate aspects of SLI from the interstate. Much like the case in NCUC I and NCUC II, there is no practical reason for entities to have two separate telephone directories based on the location of the listed party. Indeed, such a scenario would permit the Commission to regulate terms only over the interstate directory. Moreover, it is not at all clear that such separation is even possible because the use of SLI for interstate or

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35 See Maryland PSC, 907 F.2d at 1515-16 (Commission had valid interest in preempting unwarranted charges imposed by the states).

36 See Maryland PSC, 909 F.2d at 1512 (upholding FCC preemption designed to foster competition in the billing and collection area); NCUC I, 537 F.2d at 795-96 (preemption was designed to foster competition in the CPE market).

37 In that regard, two members of the conference committee expressly stated that Section 222(e) was passed to curtail LEC's anticompetitive behavior towards independent directory publishers.

intrastate purposes shifts depending on (1) the location of the receiving publisher; (2) the geographic content contained in the directory; (3) the distribution area of the directories; and (4) the location and desire of the end user - is the consumer located in-state and/or is the consumer using the directory to make an intrastate or interstate call.

State regulation, given the impossibility of separating the interstate and intrastate aspects of SLI, could negate the Commission's exercise of its jurisdiction over SLI. The Florida PSC, for example, permits BellSouth to charge a "market based price" of four cents per listing which, as BellSouth admits, represents a 1,300% profit over incremental cost. The Florida PSC also allows BellSouth to charge $1.50 per new connect listing; that price hinders if not eliminates the ability of many directory publishers to obtain new connect listings.[38] The Florida PSC also has defined the term directory to exclude Internet directories. Consequently, a competing directory publisher wishing to produce an Internet directory must obtain listings under BellSouth's more restrictive tariff for directory assistance. Such restrictions, ADP believes, plainly contravene Section 222(e).[39]

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38 ADP notes that the Canadian Radio-Television and Telecommunications Commission requires that new connect or update listings be provided at the same rate as standard listings.

39 See, e.g., NARUC v. FCC, 880 F.2d 422, 428-31 (D.C. Cir. 1989) (upholding Commission preemption of state inside wiring regulations to the extent that such state regulations

IV. The Commission Certainly Has Authority To Implement Section 222(e) In Conjunction With Section 4(i).

The fact that Section 222(e) does not say expressly that "the Commission may issue rules implementing this section" does not mean that the Commission is precluded from doing so. Section 4(i), 47 U.S.C. § 154(i), allows the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions. (emphasis added). In characterizing Section 4(i) as the Commission's "necessary and proper" clause, courts have recognized that Section 4(i) permitted Commission action that is not explicitly authorized to the extent necessary to regulate effectively those matters that are within the Act.[40]

The cases recognizing the Commission's authority under Section 4(i) are numerous. In Nader v. FCC, the D.C. Circuit held that a Commission order prescribing a rate of return for AT&T "was in the public interest, necessary for the Commission to carry out its functions in an expeditious manner, and within the agency's Section 4(i) authority," even though the Act made no mention of any such authority to prescribe a rate of return.[41]

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negated the federal policy of ensuring a competitive market for inside wiring).

40 See New England Telephone and Tel. Co. v. FCC, 826 F.2d 1101, 1108 (D.C. Cir. 1987)(quoting North American Telecomm. Ass'n v. FCC, 772 F.2d 1282, 1292 (7th Cir. 1985)), cert. denied, 490 U.S. 1039 (1989). Other sections conferring similar authority include Section 201(b) and 303(r).

41 520 F.2d 182, 204 (D.C. Cir. 1975).

In Lincoln Telephone Co. v. FCC, the court affirmed a Commission order requiring a tariff filing by a telephone company that arguably qualified as a "connecting carrier" where the only provision in the Act expressly requiring carriers to file tariffs, 47 U.S.C. § 203(a), explicitly exempted connecting carriers.[42] Similarly, in North American Telecomm. Ass'n v. FCC, the 7th Circuit upheld a Commission order requiring the Bell holding companies to file capitalization plans for subsidiary companies organized to sell telephone equipment, because such a requirement "was necessary and proper to the effectuation" of the Commission's functions.[43] More recently, in New England Telephone,[44] the D.C. Circuit affirmed a Commission order requiring telephone companies to refund charges they had collected in excess of the authorized rate of return even though the Act's only provision expressly authorizing refunds "does not apply to the circumstances of this case."

V. Conclusion.

As shown above, the Commission has full jurisdiction over SLI pursuant to Section 222(e). That is made most clear by the fact that Section 222(e) was made part of the Communications Act and is confirmed by the lack of any express delegation to the states anywhere in the statute. Moreover, Section 222(e) is

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42 659 F.2d 1092, 1108-09 (D.C. Cir. 1981).

43 772 F.2d 1282, 1292-93 (7th Cir. 1985)

44 826 F.2d at 1107-1109.

concerned with the promotion of competition in the yellow pages market and not with telecommunications. Thus, Section 222(e) is distinctly different from the provisions that were before the Eighth Circuit in Iowa Utilities Bd. Since SLI is not "fundamentally intrastate in character," Section 2(b) cannot bar the Commission from implementing Section 222(e) and, if necessary, preempting conflicting state regulation. Indeed, state regulation already exists that contravenes Section 222(e)'s plain language. In light of the above, the Commission has both the authority and the obligation to promulgate rules under Section 222(e).